

NO. 48489-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL HORN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR COWLITZ COUNTY

The Honorable Michael Evans, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

APPELLANT WAS DENIED HIS RIGHT TO PRESENT A COMPLETE DEFENSE.

In his opening brief, appellant Michael Horn asserts he was denied his right to present a complete defense when the trial court excluded evidence of Suzy Oubre's continued intimate relationship with Horn (immediately resuming a romantic relationship, going on trips, getting engaged) after the alleged incident – evidence that was relevant to disproving an element of felony harassment (i.e. whether Oubre reasonably feared that Horn would kill her the night of the incident). Brief of Appellant (BOA) at 10-17. In response, the State claims that the trial court properly excluded the evidence because it was irrelevant and prejudicial to the State. State Brief of Respondent (BOR) at 16. As explained below, the State is incorrect.

The State correctly recognizes a primary issue at trial regarding the felony harassment charge was whether the State could prove beyond a reasonable doubt that Oubre believed Horn would carry out his threat to kill her. BOR at 21. However, it wrongly suggests that Oubre's decision to immediately resume a romantic relationship after he bailed out was not relevant because

that happened subsequent to the charged incident. BOR 21-22. The Washington Supreme Court has recognized that both prior and subsequent acts by a person may be admissible to show that person's state of mind during an incident. State v. Finch, 137 Wn.2d 792, 822-23, 975 P.2d 967, 987-88 (1999) (citations omitted).

The State also incorrectly claims that the excluded evidence was not relevant because "[Horn's] defense was voluntary intoxication and not that [Oubre] had a motive to lie." BOR at 22. The State overlooks the fact that Horn's defense also consisted of holding the State to its burden of proving every element beyond a reasonable doubt – and one of those elements was whether Oubre reasonably feared the threat would be carried out. CP 61. Horn was never trying to establish Oubre had some motive to falsely accuse him; instead, his defense specifically questioned whether there was proof beyond a reasonable doubt that Oubre had reasonable fear during the incident. The fact that Oubre quickly resumed the romantic relationship, traveled with him out of state,

and accepted a marriage proposal tended to disprove the existence of that element. As such it was relevant and material. ER 401.¹

The State cites several cases to support its suggestion that evidence of subsequent acts by Oubre was not relevant to the legal issue before the jury. BOR at 17-21. However, the holdings of those cases – with their unique facts and circumstances – simply do not apply here. Indeed, it is well established that “[e]vidence’s relevancy depends on the circumstances of each case and the relationship of the facts to the ultimate issue.” State v. Abramson, 146 Wn. App. 1001 (2008)

First, the facts in State v. Harris, 97 Wn. App. 865, 866-69, 989 P.2d 553, 554 (1999) are distinguishable. There, the charge was third degree rape. The defense sought to introduce a paternity test to establish the fact that the defendant was not the father of the victim’s baby and testimony that the victim claimed to be raped by another man at a different time. The Court found that because the defense was consent (i.e. admitting to the fact intercourse

¹ To be relevant, evidence need only tend to prove or disprove the existence of a fact that is of consequence to the outcome of the case, including facts that provide evidence of any element of a defense. ER 401. “[T]he threshold for relevance is extremely low under ER 401....” City of Kennewick v. Day, 142 Wn.2d 1, 8, 11 P.3d 304 (2000). Relevance and materiality merely requires a “logical nexus” between the evidence and the fact to be established. State v. Peterson, 35 Wn. App. 481, 484, 667 P.2d 645 (1983).

occurred) then paternity of the child was irrelevant to a question of guilt. Additionally, it held that testimony regarding the victim's prior rape accusation was too remote and too speculative to be relevant.

Unlike in Harris, Horn's defense did not render the excluded evidence irrelevant. Even though Horn raised a voluntary intoxication defense (which involves determining whether Horn acted with the requisite intent), evidence regarding Oubre's state of mind during the incident was still relevant. Indeed, there still existed a logical connection between the evidence of Oubre's quickly resuming an intimate relationship with Horn and the question of whether she had reasonably feared Horn would carry out his threat to kill. Moreover, the facts involved the same parties, were closely related in time to the incident, and were not speculative. Hence, Harris's holding simply does not apply.

Likewise, the State's reliance on State v. Rice is misplaced. There, the trial court excluded evidence that the burglary victim had assaulted and abducted friends of the defendant's brother because the victim had been swindled by the defendant in a drug deal. This evidence was offered solely to discredit the witness and to show a motive to falsely accuse, not to challenge the evidence regarding a specific element. The trial court excluded the evidence because it

would have inflamed the jury and elicited an emotional response against the victim for committing the alleged assault and abduction, and it would have confused the jury by diverting its attention away from the burglary. Id. at 13.

Here, unlike in Rice, the excluded evidence itself would not have inflamed the passions of the jury against Oubre because it was evidence that fell within same context of what they had already heard. The evidence involved the same two people, the same relationship, and was closely related in time. RP 64-66, 70-71. The jury had already heard the fact that Oubre had resumed her relationship with Horn after rocky times. As such, the excluded evidence was not any more likely to unduly inflame the passions of the jury than was the evidence already presented by the State.

Additionally, any possibility of prejudice to the State or potential for confusion could have been easily handled with a limiting instruction stating something to the effect that the jury was to consider the evidence only for the purpose of determining whether Oubre was placed in reasonable fear that the threat would be carried out. This issue was apparently never addressed in Rice. Hence, the circumstances of this case are markedly different than those in Rice. As such, that holding is inapplicable.

Finally, the State also mistakenly relies on State v. Perez-Valdez, 172 Wn.2d 808, 265 P.3d 853, 854 (2011). There, the State charged the defendant with second and third degree rape of a child. The defense theory was that the victims were lying about the entire incident, making false accusations of repeated rapes. To support this defense, Perez-Valdez sought to introduce evidence that the victims had subsequently engaged in a single act of arson in their new placement. The trial court excluded the evidence and our Supreme Court affirmed, finding that there was not a strong logical connection between the false accusation of years of rape and the subsequent arson incident. Id. at 816. Additionally, the Supreme Court noted that the probative value of the arson evidence was lessened by the fact that the defense was able to present substantial evidence regarding the victims' reputation for untruthfulness. Id.

Here, unlike in Perez-Valdez, Horn did not seek to admit the evidence that Oubre quickly resumed her intimate relationship with Horn after the incident for the purpose of showing she was making a false accusation in general. Instead, he sought to introduce it for the limited purpose negating a specific element of the crime. Additionally, unlike in Perez-Valdez, the probative value of the

excluded evidence was not mitigated by other defense evidence before the jury regarding Oubre's lack of fear. Hence, the circumstances of this case differ significantly from those in Perez-Valdez.

Next, the State claims that Horn intended to introduce this evidence as a means of "besmirching" Oubre's character. RP 23. However, the Defense was very clear that the purpose for bringing this evidence in was to rebut the State's claim that Oubre reasonably feared Horn would carry out the threat to kill. RP 64-66, 70-71. The record simply does not validate this self-serving claim by the State.

The State also suggests that the evidence should have been excluded because Oubre testified that her relationship with Horn was wonderful 95% of the time and unsafe 5% of the time and, thus, it was consistent for her to have resumed her relationship with Horn after the incident. BOR at 22. However, this raises a factual question for the jury, going to weight not admissibility. Hence, this argument is simply not on point here.

Finally, the State claims the excluded evidence was unduly prejudicial because it would have muddled the case by inflaming the passions of the jury and diverting their attention away from the

issues relevant to determining guilt. However, as stated above, any potential prejudice could have been easily handled with a limiting instruction, which the jury would be presumed to follow. State v. Anderson, 153 Wn. App. 417, 427, 428 220 P.3d 1273 (2009) (explaining that appellate courts presume the jury follows instructions given by the trial court).

In sum, as explained in detail in appellant's opening brief, defendants have a constitutional right to present a complete defense. BOA at 11-13. Horn was denied this right when the trial court excluded evidence that was relevant to Oubre's state of mind during the incident (an element of the charged offense). BOA at 11-16. As explained above, the State has not offered legal authority or logical argument supporting the trial court's exclusion of this evidence. Hence, this Court should reverse.

B. CONCLUSION

For reasons stated herein and those in appellant's opening brief, this Court should reverse appellant's conviction.

DATED this 20th day of December, 2016

Respectfully submitted,

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